

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JOSEPH THOMAS, on behalf of himself	:	CIVIL ACTION
and all others similarly situated,	:	
	:	
v.	:	
	:	
CENDANT MORTGAGE	:	NO. 03-1672

O'NEILL, J.	MARCH 11, 2005
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MEMORANDUM AND ORDER

Plaintiff, Joseph Thomas, filed a class action complaint against defendant, Cendant Mortgage, on March 19, 2003, alleging that defendant violated two provisions of the Fair Credit Reporting Act ("FCRA"), 15 U.S.C. §§ 1681m(a) and 1681m(b) (2004). I issued an opinion denying defendant's motion to dismiss, denying defendant's motion for summary judgment with respect to plaintiff's Section 1681m(a) claim, and granting defendant's motion for summary judgment with respect to plaintiff's Section 1681m(b) claim. Therefore, plaintiff's Section 1681m(a) claim is the only claim remaining in this case. Before me now is plaintiff's "motion for leave to take class action discovery and to proceed with case as class action" and defendant's opposition thereto.

The facts underlying Thomas' individual claim are discussed in my November 15, 2004 opinion. Thomas v. Cendant Mort., No. 03-1672, 2004 WL 2600772 (E.D. Pa. November 15, 2004). There are two relevant holdings from that opinion. First, I held, as a matter of law, that Cendant did not rely upon any credit information supplied by any non-consumer reporting agency, including Fannie Mae. Rather, the evidence indicated that Cendant based its loan

determination solely on Thomas' credit report provided by CBC Companies. Second, I held that, as a matter of law, Cendant does not maintain a policy of non-disclosure with respect to information obtained from consumer protection agencies. Although Cendant does maintain a policy of non-disclosure with respect to information obtained from non-consumer reporting agencies, such a policy does not violate the Fair Credit Reporting Act ("FCRA").

I. Class Action Status

Focusing on the heart of matter, Thomas fails to allege properly that questions of law or fact common to the members of the putative class predominate over any questions affecting only individual members. See Fed. R. Civ. P. 23(b)(3). In his complaint, Thomas defines the putative class to include:

All persons residing in the United States of America who applied for a mortgage with Cendant Mortgage within the two years preceding the filing of this action whose applications Cendant denied or did not approve at the most favorable terms and interest rate available based, in whole or in part, on information contained in a consumer report or from Fannie Mae or Freddie Mac.

My previous opinion eliminates the claims of Thomas under Section 1681m(b) with respect to non-consumer reporting agencies, including Fannie Mae and Freddie Mac, and eliminates the theory that Cendant maintained a policy of non-disclosure with respect to information obtained from consumer protection agencies. Flying in the face of my holding, however, Thomas continues to argue that:

[Cendant] intentionally carries out a corporate policy and practice of not disclosing its reliance on consumer reports and non-consumer reports obtained from third party Fannie Mae to those mortgage applicants against whom it takes adverse action. Whether [Cendant] does indeed engage in such a policy and practice is a threshold common question which predominates over all others.

(Pl.'s Motion, p. 19). I will not change my previous rulings. My opinion leaves intact only the

claims of Thomas with respect to consumer reporting agencies, here CBC Companies, under Section 1681m(a).

Beyond his attempt for a second bite at the judicial apple, Thomas appears to pursue the theory that Cendant denied (or did not approve at the most favorable terms and interest rate available) the applications of a class of individuals based on information obtained from CBC Companies in violation of Section 1681m(a). Under this theory, Thomas' class definition must allege that Cendant somehow denied (or did not approve at the most favorable terms and interest rate available) the applications of multiple individuals based on information contained in consumer reports relating to such individuals without the theory that Cendant maintained such a policy.

Thomas generally asserts that the putative class is a group of mortgage applicants who are caught "in between" those applicants who Cendant approves at the best rates and terms and those applicants who Cendant denies outright, and are thus, not provided with timely and proper adverse action notice under the FCRA. Thomas supports this allegation with certain established facts: (a) that Cendant "obtains and reviews the credit reports of mortgage applicants as one of the initial steps in processing mortgage applications"; (b) that Cendant's Regulatory Compliance Manual requires Cendant "to send an 'adverse action' disclosure or notice to mortgage applicants who do not meet its credit criteria and are outright 'denied' for a mortgage"; (c) that "[a]pplicants who are 'approved' at the best rates and terms are not sent such a notice"; (d) that it is the usual practice of Cendant not to send adverse action notice to individuals whose applications are incomplete or pending, or who have received and accepted counteroffers; (e) that Cendant "employs set credit criteria in determining whether mortgages are approved or denied"; and (f)

that applications are processed via the computerized PHHORCE system, which classifies the status of an individual's application, or if applicable, triggers Cendant to send an adverse action notice.

These facts do not suggest that Cendant took adverse action against anyone other than Thomas without proper notification or engaged in a common course of conduct that implicates the FCRA. Rather, they suggest that Cendant maintains a system for processing individuals' applications that does not offend the FCRA. Nor does Thomas support his motion with any allegations that would suggest the presence of a class of individuals with a similar set of factual questions. Without the benefit of the theories I have rejected, Thomas now must allege and prove that each mortgage applicant's application was denied as a result of the specific behaviors of independent Cendant employees who based their determinations on each applicant's particular financial situation as reflected in each applicant's consumer report. However, these individual questions of fact predominate over the common question of whether Cendant denied various individual's mortgage applications in violation of the FCRA and, thus, preclude class action status in this case.

II. Class Action Discovery

Thomas asserts that "once he has had the opportunity to take discovery on class issues, and delineate more particularly the contours of the 'in between' group of consumers, he will be able to seek certification of a class with a definition substantially similar to that of his Class Action Complaint." Thomas bases his motion on the mere possibility of discovering a class of individuals against whom Cendant took adverse action and to whom Cendant failed to provide notice of such adverse action. However, "discovery is not intended as a fishing expedition

permitting the speculative pleading of a case first and then pursuing discovery to support it; the plaintiff must have some basis in fact for the action.” Zuk v. E. Pa. Psychiatric Inst. of the Med. College of Pa., 103 F.3d 294, 299 (3d Cir. 1996); Micro Motion, Inc. v. Kane Steel Co., Inc., 894 F.2d 1318, 1327 (Fed. Cir. 1990) (“The discovery rules are designed to assist a party to prove a claim it reasonably believes to be viable without discovery, not to find out if it has any basis for a claim. That the discovery might uncover evidence showing that a plaintiff has a legitimate claim does not justify the discovery request.”) (citations omitted). Thomas’ motion, therefore, will be denied.

AND NOW, this 11th day of March 2005, upon consideration of plaintiff’s “motion for leave to take class action discovery and to proceed with case as class action” and defendant’s opposition thereto, and for the reasons set forth above, it is ORDERED that plaintiff’s “motion for leave to take class action discovery and to proceed with case as class action” is DENIED. Plaintiff may proceed with the case as an individual action.

s/ Thomas N. O’Neill, Jr
THOMAS N. O’NEILL, JR., J.